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In The

Supreme Court of the United States

OCTOBER TERM 1972

No._____

JAMIE DEAN ALEXANDER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Jamie Dean Alexander respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on July 5, 1972.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported (Appendix p A-1). The District Court gave no opinion.

JURISDICTION

The jurisdiction of the District Court for the District of Oregon was founded on *18 USC § 3231.* The jurisdic-

tion of the Court of Appeals was founded upon *28 USC § 1291.*

The judgment of the Court of Appeals was entered on July 5, 1972 (Appendix p A-7). A timely petition for rehearing was denied on August 16, 1972. This petition for certiorari will be filed by September 15, 1972. This Court's jurisdiction is invoked under *28 USC § 1254 (1).*

QUESTIONS PRESENTED

1. When a search warrant is issued to search for and seize stolen gold in an automobile securely in police custody, and none is found, but unknown substances are found which are suspected to be illegally possessed drugs, may they be seized without an additional warrant?

2. When the elements of the crime charged are possession of drugs without a prescription, can the burden be placed upon defendant to prove his innocence without violating the due process clause of the Fifth Amendment?

3. When White and Alexander came in Alexander's automobile with the stolen teeth, does any logical basis exist for attributing the drugs found in the back seat of the car to Alexander rather than to White or to both?

4. Was the instruction proper that recent possession of the stolen property allowed an inference that defendants knew they were stolen?

5. Was it permissible for the government to show a defendant when questioned about this charge, had claimed the Fifth Amendment?

6. Is it permissible to impeach a defendant witness by showing a conviction, but without judgment, for attempted abortion under the old Oregon law?

STATEMENT OF THE CASE

This is two appeals from two convictions that were consolidated because they arose out of interrelated transactions.

The first is the conviction of Jamie Dean Alexander of 6 counts of possession of controlled drugs without a prescription after trial by a judge without a jury upon which sentence of one year was imposed (I, pp 1-2, 9, 17, 21).

The second is the conviction of Kenneth Eugene White and Jamie Dean Alexander of one count of receiving stolen teeth, and one count of conspiracy to do so after trial by jury (I, pp. 4-5, 19-20). A third defendant, Lawrence Bernard, was tried by the judge without a jury, and acquitted (V, p. 473). White was sentenced to four years on these counts. Alexander was sentenced to four years on each count, with an additional $5,000 fine on Count I (I, pp. 22-23).

All sentences were concurrent (I, pp. 21-23), and defendants were bailed pending appeal.

Facts Relevant to Issues

1. After the arrest of defendants on the charge of receiving stolen teeth, which teeth were in their possession, a search warrant was procured to search Alexander's automobile in which defendants had arrived,

for gold also stolen with the teeth (Exh. 1 and 2, Exh. 20 and 21).

The car and its contents were at that time safely in the custody of the Portland Police Bureau (V. p. 14).

No gold was found in the search, but a paper sack was found in this car "containing 12 bottles of unknown substance", which was taken (I, p. 12, Exh. 1 and 2, Exh. 20 and 21) without an additional warrant (V. p. 14).

After examination by a chemist these were discovered to be 6 types of controlled drugs (I, pp. 13-15, II, pp. 2-3), and Alexander was charged with 6 counts of possession without prescription (I, pp. 1-2).

Defendant Alexander moved to suppress this evidence on the ground this material was not described in the search warrant and was not known to be contraband or seizable (I, pp. 10, 11; IV, pp. 7), which was denied (IV. p. 22).

2, 3. No other evidence was offered as to Alexander's possession of these drugs, and no evidence was offered that he did not have a prescription for them, the Government apparently claiming defendant Alexander had the burden of establishing lawful possession (II p. 39).

Defendant Alexander moved for judgment of acquittal for inadequate proof of possession by Alexander, for failure to show lack of a prescription and placing the burden of disproving an element of the charge upon defendant violated due process under the United States

Constitution (II, pp. 28-29, 31, 35, 38-39). This motion was denied and defendant convicted (I, p. 17, II, p. 43).

4. It was unquestioned that the teeth which were the basis of the receiving and conspiracy indictment were stolen in a burglary of a Denver dental supply house (II, pp. 4-28).

The defendants had twice received teeth from a Robert Burr, a Denver dental technician, which they had sold in the first instance to Dr. Lawrence Bernard, Oregon's largest practicing dentist (IV, pp. 243-247), and on the second occasion had attempted to sell them for a commission to a Portland dental supply house, Western Dental Equipment and Supply Company (IV, p. 113), upon Dr. Bernard's suggestion (IV, pp. 251-252), whose manager became suspicious and caused their arrest (III, pp. 103-117). Nothing was said to indicate the teeth were stolen, and the price offered was actually high (III, p. 121). There was nothing in the history of this company to indicate it would buy stolen merchandise (III, p. 122).

While there had been no repercussions over the sale of the first lot of teeth, which had been paid for by two checks (IV, p. 246) and signed with White's correct name, address and telephone number (IV, p. 224, Exh. 30, 31), the government offered evidence that these also had been stolen (III, pp. 186-189).

To establish that defendants knew the teeth were stolen in both instances, the government used Harriet Burr, one of the thieves who had transported the teeth

interstate (III, p. 67), as a witness that she had told them so (III, pp. 32, 43, 47, 90-91).

Mrs. Burr testified under a grant of immunity for herself and her husband, both from the United States and from the State of Colorado (III, pp. 32, 67-69), including lying before the Grand Jury (III, pp. 72-73).

Defendants as witnesses denied they knew or had been told the teeth were stolen (III, pp. 212-213, 215-216, 220; IV, p. 254).

The Court instructed the jury as follows:

> "Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in light of surrounding circumstances shown by the evidence in the case that a person in possession knew the property had been stolen. The same inference may reasonably be drawn from a false explanation of such possession" (IV, pp. 463-464).

Defendants objected thereto as follows:

> "MR. LONERGAN: * * * I would object to the giving of Government's Instruction No. 13 as drawn on the ground that in the circumstance of this case, the possession of recently stolen property is not evidence that it was known to be stolen, and there was no false explanation to be evidence of knowing it to be stolen, but that some other evidence other than possession of stolen property is necessary for that purpose under the circumstances of this case."

5. On the trial the government agent, not responsively, testified that defendant White would not talk about the reason for his arrest (III, p. 153). Defendants

moved for a mistrial (III, p. 153), and in the alternative to have it stricken and the jury instructed to disregard this (III, p. 155), because it called for an inference from an exercise of Fifth Amendment rights (III, pp. 153-161). This was denied (I, p. 18).

6. Defendant Alexander, over defense objection was impeached by proof that he had been convicted but not sentenced for attempted abortion under the old Oregon abortion law, over defense objection to the lack of judgment, lack of moral turpitude and the unconstitutionality of that statute (IV, pp. 255-264).

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Ninth Circuit has decided important questions of Federal law which have not been, but should be, settled by this Court.

ARGUMENT

1. Since the Fourth Amendment requires that a warrant particularly describe the things to be seized, seizures beyond its scope without further warrant are severely curtailed to things immediately recognized as evidence, not mere suspicion. *Coolidge v. New Hampshire*, 403 US 443, 466 (1971); *U. S. v. Flanagan*, 5 Cir. 423 F2d 745 (1970).

2. The drug statutes involved state:

21 USC 331 (9) (3) (B)

> "The following acts and the causing thereof are prohibited:
>
> "* * *
>
> "the possession of a drug in violation of section 360 a (c) (2) of this title; * * *"

21 USC 360 (c) (2)

> "No person other than a person described in subsection (a) or (b) (2) of this section shall
>
> "• • •
>
> "otherwise possess any such drug unless such drug was obtained directly or pursuant to a valid prescription from a practitioner (licensed by law to prescribe or administer such drug) while acting in the course of his professional practice."

This made it incumbent on the government to prove Alexander did not have a prescription; it could not place the burden upon him to prove his innocence. *U. S. v. Vuitch*, 402 US 62 (1971); *Stump v. Bennett*, 8 Cir. 398 F2d 111 (1968).

3. Since Alexander and White both came to the staked out premises in Alexander's car with the stolen teeth, there is no logical basis for saying the drugs found in this car could be attributed to Alexander's possession. They could just as logically be White's, or that of both. *Delgado v. U. S.*, 9 Cir. 327 F2d 641 (1961).

4. While possession must be shown under *18 USC 2315*, knowledge that the property was stolen must also be shown. Certainly it is illogical to say that proof of mere possession without more suffices to prove knowledge. *Bollenback v. U. S.* 326 US 607 (1946); *State v. Long*, 243 Or. 561, 415 P2d 171 (1966); *State v. Shipman*, 2 Or. App. 359, 468 P2d 921 (1970).

5. The admission into evidence that the defendant claimed his Fifth Amendment right to silence when questioned by an FBI agent as to the facts of this charge had no legitimate purpose. *Miranda v. Arizona*,

384 US 436, 468 (1966); *U. S. v. McKinney*, 6 Cir. 379 F2d 259, 262 (1967). Its only use could have been to call for an adverse inference from such claim. *Griffin v. California*, 380 US 609 (1965).

6. To be usable for impeachment there must be a judgment imposed on the verdict and a suspended sentence is the absence of a judgment. *Thomas v. U. S.*, DC Cir. 121 F2d 905, 907 (1941); *U. S. v. Levi*, 7 Cir. 177 F2d 827, 829 (1949); *People v. Marendi*, 213 NY 600, 616, 107 NE 1058, 1063 (1915); *People v. Malkin*, 250 NY 185, 196, 164 NE 900, 905 (1928).

Furthermore it must be for a crime involving moral turpitude. *U. S. v. Griffin*, 6 Cir. 378 F2d 445 (1967). In this day and age a conviction for attempted abortion under the now repealed Oregon abortion law does not qualify.

ORS 163.060 (repealed 1969)

> "If any person administers to any woman pregnant with a child any medicine, drug or substance whatever or uses or employs any instrument or other means with intent thereby to destroy such child, unless the same is necessary to preserve the life of such mother, such person shall, in case the death of such child or mother is thereby produced be deemed guilty of manslaughter."

Furthermore, this statute is unconstitutional, is vague, uncertain, lacking in standards, infringes the right of a woman to have an abortion at her will alone. *People v. Belous*, 71 C2d 954, 80 Cal. Rptr. 354, 458 P2d 194 (1969); *Babbits v. McCann*, DC E Wis. 310 F Supp. 293 app dism 400 US 1 (1970); *Hardin v. De-*

partment of Health, DC E Wis. 323 F Supp. 899 (1971). Its requirement that defendant prove the lawfulness of the abortion, cf. *State v. Hawkins*, 255 Or. 39 45, 463 P2d 858, 861 (1970), also makes this statute unconstitutional. *U. S. v. Vuitch*, 402 US 62 (1971); *Stump v. Bennett*, 8 Cir. 398 F2d 111 (1967). A conviction procured by use of an unconstitutionally obtained judgment cannot stand. *Burgett v. Texas*, 389 US 109 (1967).

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

HOWARD R. LONERGAN
Counsel for Petitioner

APPENDIX

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*	)	
vs.	)	No. 71-2488
KENNETH EUGENE WHITE, *Appellant.*	)	

UNITED STATES OF AMERICA, *Appellee,*	)	
vs.	)	No. 71-2489
JAMIE DEAN ALEXANDER, *Appellant.*	)	

[July 5, 1972]

Appeal from the United States District Court for the District of Oregon

Before: HUFSTEDLER and CHOY, Circuit Judges, and SCHNACKE, District Judge.*

PER CURIAM:

Jamie D. Alexander appeals his conviction by a judge without a jury for possession of twelve bottles of drugs without a prescription, in violation of 21 U.S.C. §331(q) (3) (B).[1] Alexander and Kenneth E. White appeal their convictions by a jury of receipt and con-

*The Honorable Robert H. Schnacke, United States District Judge for the Northern District of California, sitting by designation.

[1]The 1970 Drug Abuse Prevention and Control Act, 21 U.S.C. §§801 *et seq.*, repealed §§331(q) (3) (B) and 360a (c) (2). However, the Act contained the usual savings provision.

cealment of stolen goods which had been moved in interstate commerce, in violation of 18 U.S.C. §2315, and of conspiracy to commit the substantive crime. We affirm.

1. White and Alexander were arrested by the FBI in Portland, Oregon, in possession of about 17,860 false teeth worth between $25,000 and $26,000, which had been stolen from the Dental Specialty Company in Denver, Colorado. An accomplice testified for the Government that she had told White and Alexander the teeth were pilfered, but both men denied knowledge that the goods were in fact stolen. Their objection to the jury instruction that possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may rationally infer that the person involved knew the property was stolen, is meritless. *United States v. Linder*, 442 F2d 419 (9th Cir. 1971); *United States v. Redd*, 438 F2d 335 (9th Cir. 1971).

2. During the examination of the FBI agent who interviewed White after his arrest, the following colloquy occurred:

> Prosecutor: Did he (White) agree to say anything or talk to you at all?
>
> Witness: He agreed to talk about certain things. He would not talk about the reason for the arrest.

White contends that this statement called for the jury to draw an adverse inference from his decision to claim his Fifth Amendment right to remain silent. The witness was not entirely responsive to the question

asked; the prosecutor sought to elicit only White's Portland address and telephone number. The inadvertent situation here is not comparable to the overt prosecutorial misconduct of *Griffin v. California*, 380 U.S. 609 (1965). The error, if any, was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1966).

3. Alexander objects to the Government's use of a prior Oregon conviction to impeach him when he took the stand in his own behalf. Three years before the trial, Alexander was found guilty of manslaughter abortion, a felony in violation of ORS §163.080 (repealed, 1969). He received a suspended sentence, with five years probation.

Alexander argues that this conviction was improperly used to impeach him. First, he contends that since his sentence was suspended, no judgment was imposed. He was, however, found guilty of a felony and received probation. The guilty finding was final, and regardless of the penalty, provided sufficient reason for viewing his testimony with suspicion. See Annot., 14 A.L.R. 3rd 1272 (1967). Second, he argues that the conduct involved did not amount to moral turpitude, and thus cannot be used to impeach him under *United States v. Griffin*, 387 F2d 445 (6th Cir. 1969). However, in this Circuit, any felony, whether or not it involves moral turpitude, may be used to impeach. *Burg v. United States*, 406 F2d 235 (9th Cir. 1969). Third, Alexander alleges that the Oregon abortion law, although repealed, is unconstitutional, thus preventing the use of an invalid conviction for impeachment purposes. Nevertheless,

Alexander violated the law as it then was; and this fact was used to impeach his credibility. *Burgett v. Texas*, 389 U.S. 109 (1967), where the Supreme Court held that a conviction obtained in violation of the defendant's right to counsel could not be used to impeach him, is not comparable.

4. The FBI agents who arrested White and Alexander asked the Portland police to impound Alexander's car. Alexander refused to consent to a search of the car, and the agents obtained a search warrant. After obtaining the keys from Alexander, the FBI searched the car, finding on the floor of the back seat immediately behind the driver's seat a box containing twelve bottles of pills. The bottles lacked price tags or other sales identification, but bore labels warning that a prescription was required. No doctor's prescription labels were on the bottles. The bottles and the pills were seized. When analyzed, the pills were identified as drugs the possession of which without a valid prescription violated 21 U.S.C. §§331 (q) (3) (B) and 360a (c) (2).

Alexander contends that the seizure of the pills should have been suppressed as beyond the scope of the search warrant. We assume that the pills were not encompassed by the warrant. Nevertheless, the FBI had a valid warrant to search the car. In the course of executing the valid warrant, the agent saw the contraband pills in plain view. He was not constitutionally commanded to shut his eyes and to forego seizure of the contraband. *Cf. Coolidge v. New Hampshire*, 403 U.S. 443, 464-73 (1971).

5. The indictment against Alexander did not allege, nor did the Government offer any proof that he did not have a prescription for the drugs. He now asserts that this omission resulted in a failure to prove one of the elements of the offense. However, the valid physician's prescription exception to §360a(c)(2) is an affirmative defense, which must be pleaded and proved by the defendant. *Tritt v. United States*, 421 F2d 928 (10th Cir. 1970); *United States v. Rowlette*, 397 F2d 475, 479 (7th Cir. 1968). *Cf. also, United States v. Safeway Stores, Inc.*, 252 F2d 99, 101 (9th Cir. 1958); *United States v. Young*, 422 F2d 302, 306, n. 11 (8th Cir. 1970).

6. Finally, Alexander asserts that the evidence adduced was insufficient to prove that he had possession of the drugs. Viewing the evidence in the light most favorable to the jury verdict, *Glasser v. United States*, 315 U.S. 60, 80, (1942), there was sufficient evidence that Alexander had control and dominion over the car in which the drugs were found. He owned it. He had driven it the day of the arrest, and he had the keys. This is not a case like *Dalgado v. United States*, 327 F2d 641 (9th Cir. 1964), in which marijuana was found in a drawer of a night stand in the defendant's bedroom. In *Delgado*, it was nothing more than speculation whether the man or the woman or both had possession of the marijuana. Here there is only uncorroborated hearsay that White was in the car with Alexander on the day of the arrest. The evidence was sufficient to establish that the automobile was under Alexander's exclusive

control and dominion. *Hernandez v. United States*, 370 F2d 171, 172 (9th Cir. 1966).

Affirmed.

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*
v.) No. 71-2489
JAMIE DEAN ALEXANDER, *Appellant.*

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered July 5, 1972

ORDER OF COURT OF APPEALS DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*	)	
v.	)	No. 71-2488
KENNETH EUGENE WHITE, *Appellant.*	)	

UNITED STATES OF AMERICA, *Appellee,*	)	
v.	)	No. 71-2489
JAMIE DEAN ALEXANDER, *Appellant.*	)	

ORDER

Before: HUFSTEDLER and CHOY, Circuit Judges, and SCHNACKE, District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

HERBERT J. C. CHOY,
United States Circuit Judge

*The Honorable Robert H. Schnacke, United States District Judge for the Northern District of California, sitting by designation.